

**UNITED STATES OF AMERICA
BEFORE THE
SURFACE TRANSPORTATION BOARD**

CF INDUSTRIES, INC.,)	
Complainant,)	
)	
v.)	
)	
KANEB PIPE LINE PARTNERS, L.P.,)	Docket No. 42084
)	
and)	
)	
KANEB PIPE LINE OPERATING)	
PARTNERSHIP, L.P.,)	
Defendants.)	

**KANEB PIPE LINE PARTNERS, L.P.'S
AND KANEB PIPE LINE OPERATING PARTNERSHIP, L.P.'S
REPLY TO MOTION TO COMPEL AND
MOTION FOR PROTECTIVE ORDER**

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LINE OPERATING PARTNERSHIP, L.P.

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Pursuant to sections 1104.13(a) and 1114.21(c) of the Surface Transportation Board's rules and regulations,¹ Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. (collectively, "Kaneb"), hereby reply to CF Industries, Inc.'s ("CFI") motion to compel and request that the Board issue a Protective Order directing that discovery not be had in this proceeding. As discussed in more detail below, discovery was not contemplated by the Board when it set the procedural schedule for resolving the remaining issue in this proceeding. Moreover, discovery is inappropriate and unnecessary for the Board to resolve the single issue remaining in this proceeding. Finally, CFI has not demonstrated any need for the discovery. Therefore, the discovery requests appear to be solely for tactical purposes and not for any legitimate use by CFI.

¹ 49 C.F.R. §§ 1114.31(a), 1104.13(a) and 1114.21(c) (2003).

Therefore, the Board should deny CFI's motion to compel and should grant Kaneb's motion for a protective order.

I. BACKGROUND

In its August 11, 2004 Decision in this proceeding,² the Board directed Kaneb to submit further information regarding materially changed circumstances in order to determine whether to vacate the existing rate prescription the Board imposed in CF Industries, Inc. v. Koch Pipeline Company, L.P.³ The Board found that it could not determine "based on the record before [it] whether the bases for the original prescription remain valid,"⁴ and stated that without additional information it could not determine whether it "can or should alter or lift the Koch prescription."⁵ Consequently, the Board directed Kaneb to submit a verified statement to support its claim of materially changed circumstances. Specifically, the Board ordered that:

[The] submission should include, but need not be limited to: a list of the assets Kaneb purchased from Koch and an itemized valuation of those assets; a comparison to the assets that the Board examined in Koch; the complete Koch/Kaneb asset purchase and sale agreement; a statement setting forth facts sufficient to establish whether or not the purchase was an arm's length transaction; and any other information relevant to [Kaneb's] claim of materially changed circumstances.⁶

² CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P., STB Docket No. 42084 (STB served August 12, 2004) ("August 11 Decision").

³ CF Industries, Inc. v. Koch Pipeline Company, L.P., 4 S.T.B. 637 (2000) ("Koch"), *aff'd sub nom. CF Industries, Inc. v. STB*, 255 F.3d 816 (D.C. Cir. 2001).

⁴ August 11 Decision at 3.

⁵ Id. at 4.

⁶ Id.

The Board directed that Kaneb file its evidence by September 13; that CFI file its reply evidence on September 27; and that Kaneb file its rebuttal evidence on October 4.⁷ Kaneb submitted its Opening Evidence and Argument in compliance with the Board's order on September 13, 2004.

On September 16, 2004, CFI served Kaneb with a set of interrogatories, requests for production of documents and admissions.⁸ CFI requested that Kaneb provide responses to the extensive interrogatories and requests by September 24, 2004—merely eight days after CFI's service of the discovery requests—even though the Board's regulations clearly allow “not less than 15 days” after service of discovery requests for the party upon whom the requests have been made to respond.⁹ CFI's discovery requests seek such items as “all business plans relating to the Pipeline;”¹⁰ “any presentations or reports issued to securities analysts by Kaneb relating to the Pipeline;”¹¹ and “any minutes of the Board of Directors of Kaneb Pipe Line Company LLC relating to the Pipeline.”¹² A copy of CFI's discovery request was attached to CFI's motion to compel as Appendix A.

⁷ Id.

⁸ CF Industries, Inc.'s First Set of Interrogatories, Requests for Production of Documents and Admissions Directed to Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. (Sept. 16, 2004) (“discovery requests”).

⁹ See 49 C.F.R. §§ 1114.26(a), 1114.27(a) (2003).

¹⁰ Discovery requests at 4, n. 3.

¹¹ Id. at 6, n. 26.

¹² Id. at 6, n. 27.

The parties filed two joint motions for extensions of time, one on September 15, 2004, and one on September 24, 2004. Both motions were granted by the Board.¹³ As a result, CFI's reply evidence was due yesterday, October 7, and CFI filed its reply evidence in accordance with the extended schedule. Kaneb's rebuttal evidence is now due October 14. Consistent with the Board's orders, Kaneb and CFI verbally agreed that Kaneb's response to CFI's discovery requests would be due on October 1, 2004. Kaneb served its objections by hand delivery on counsel for CFI well before the close of business on October 1.

Five days later and less than 24 hours before CFI's reply evidence was due, Kaneb was served with a three-page motion to compel discovery.¹⁴ CFI did not request an extension of time for submission of its reply evidence, nor did CFI request that the Board issue an order shortening the 20-day time period set forth in the Board's regulations for Kaneb to reply to CFI's motion.¹⁵ Instead, CFI's motion requests that the Board order Kaneb, apparently without waiting for a reply from Kaneb, to answer fully CFI's discovery in three business days, which is October 12, 2004, well after CFI made its evidentiary filing.¹⁶ Although under the Board's regulations Kaneb is not required to reply to CFI's motion for 20 days,¹⁷ in the interest of efficient resolution of the one remaining issue in this proceeding and in the spirit of the intent expressed by the Board in

¹³ See Orders granted in CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P., STB Docket No. 42084, on September 16, 2004, and September 28, 2004.

¹⁴ The "substance" of CFI's motion is contained in two pages.

¹⁵ 49 C.F.R. §§ 1114.31(a) and 1104.13(a).

¹⁶ Three business days from October 6 is October 12, because of the intervening weekend and federal holiday on October 11.

¹⁷ 49 C.F.R. §§ 1114.31(a) and 1104.13(a).

setting a compressed schedule for prompt resolution of that issue, Kaneb is filing this Response and Motion for Protective Order now, two days after it was served with CFI's motion to compel.

II. REPLY TO MOTION TO COMPEL

The Board's regulations allow parties to obtain discovery regarding any matter, not privileged, which is "relevant to the subject matter involved in a proceeding."¹⁸ However, CFI's discovery requests will not lead to any relevant evidence, because they are not designed to elicit evidence relevant to the subject matter involved in this proceeding.

The single remaining issue in this case is whether the Board should alter or lift the rate prescription it imposed in Koch, based on material changed circumstances that affect the factual underpinnings of the prescription.¹⁹ None of the interrogatories, requests for admission and documents CFI requested will result in evidence remotely relevant to the issue before the Board. As discussed in more detail below, the evidence submitted by Kaneb is more than adequate for the Board to decide, without any discovery, whether to lift the rate prescription it imposed in Koch. In addition, CFI has not disputed in its response filed on October 7, 2004, Kaneb's claim that there has been a material change in circumstances.

Instead, CFI's discovery requests attempt to elicit information regarding any future rates Kaneb may charge should the Board lift the prescription, such as details of the bidding process for the pipeline and whether the final purchase price fairly reflected

¹⁸ 49 C.F.R. § 1114.21(a) (2003).

¹⁹ August 11 Order at 4.

the value of the pipeline assets. CFI's requests might be appropriate in a rate challenge proceeding. However, Kaneb is not seeking new rates in this proceeding, nor is Kaneb seeking to modify the existing prescription. Therefore, CFI's discovery requests will not lead to evidence relevant to the one remaining issue before the Board in this proceeding.

Furthermore, CFI has already submitted its reply to Kaneb's opening evidence and argument. CFI does not indicate that it will seek to supplement its reply if and when it receives such discovery. As such, CFI has not demonstrated any need for the discovery it seeks and does not intend to use any of the information it seeks. Instead, CFI's eleventh hour motion to compel appears to be based on a general "right" to discovery. However, as discussed in more detail in Kaneb's Motion for Protective Order below, CFI's discovery requests are solely for tactical purposes and are not designed for any legitimate use. Therefore, its motion to compel should be denied.

III. MOTION FOR PROTECTIVE ORDER

The Board's regulations state:

Upon motion by any party, by the person from whom discovery is sought . . . and for good cause shown, any order which justice requires may be entered to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding. Relief through a protective order may include one or more of the following: (1) That the discovery not be had . . .²⁰

Therefore, pursuant to 49 C.F.R. § 1114.21(c), Kaneb requests that the Board issue a Protective Order which will provide that Kaneb need not respond to CFI's discovery requests, and moreover, that discovery is inappropriate and should not be had in this proceeding. A Protective Order shielding Kaneb from discovery in this

²⁰ 49 C.F.R. § 1114.21(c).

proceeding is appropriate because: (1) the Board's August 11 Decision requested that the parties comply with a tight deadline of evidentiary submissions that did not contemplate time for discovery; (2) the Board's August 11 Decision requested evidence relating to the single issue of whether it should lift the Koch rate prescription based on changed circumstances, and discovery is not needed in this proceeding to allow the Board to do so; and (3) CFI's discovery requests are for tactical purposes only.

A. The Board's August 11 Order did Not Contemplate Discovery.

The Board's August 11 Decision requiring the parties to comply with a tight procedural schedule—30 days from the date of service of the August 11 Decision for Kaneb to submit its evidence; 14 days thereafter for CFI to file its reply; and 7 days thereafter for Kaneb to file its rebuttal²¹—did not contemplate discovery. The Board's regulations clearly state that the person upon whom interrogatories are served shall serve responses within the time period designated by the party requesting the interrogatories, “but not less than 15 days after the service thereof.”²² The same timeframe—at least 15 days to respond—is required for responses to requests for admissions.²³ Under the schedule set by the Board in this proceeding, it would be impossible to conduct discovery within the regulatory timeframe.

Kaneb's request that the Board vacate the Koch prescription, which has frozen rates subject to the prescription for 16 years at 1988 levels, has been pending for over a year. Given the Board's discovery regulations and its carefully contemplated procedural

²¹ August 11 Decision at 4.

²² 49 C.F.R. § 1114.26(a).

²³ 49 C.F.R. § 1114.27(a).

schedule in this proceeding, it is apparent that the Board intended that the remaining issue in the proceeding could and should be decided solely on the basis of evidentiary submissions and that the Board did not intend for the parties to conduct discovery.

B. Discovery is Not Needed for the Board to Decide the Single Issue Remaining in this Proceeding.

Further, the Board's August 11 Decision made clear that there remains only one issue before the Board in this proceeding: whether, based on a material change in circumstances, the Board should alter or lift the rate prescription it imposed in Koch. The Board directed Kaneb to submit certain evidence, including the Koch/Kaneb Asset Purchase and Sale Agreement ("Purchase Agreement"), in order to address this narrow question. Kaneb has complied with the Board's order in this regard, and submitted the Purchase Agreement; a verified statement regarding the arm's length nature of the Purchase Agreement transaction with Koch; a comparison of the assets; and other evidence related to its claim of materially changed circumstances. Specifically, Kaneb submitted evidence in verified statements, including: (1) Kaneb's acquisition costs in an arm's length transaction for the pipeline assets, which substantially exceed the pipeline valuation underlying the Koch prescription; (2) Kaneb's average operating costs and capital expenditures, which exceed the average operating costs and capital expenditures the Board examined in Koch; (3) volumes on the pipeline, which have decreased since the Board examined them in Koch; and (4) revenues generated from the pipeline, which have decreased since the Board imposed the Koch rate prescription.

Kaneb also submitted evidence for illustrative purposes which shows that, based on the material change in circumstances, Kaneb's return on investment, when compared

to a conservative cost of capital benchmark, would have substantially different results from the similar comparison which underlies the Board's determination in Koch. Kaneb argued that the factual underpinnings of the Koch decision no longer have validity, and that the Board should lift the rate prescription and restore ratemaking authority to Kaneb.

Accordingly, Kaneb complied with the Board's August 11 Decision requiring it to submit evidence relating to the changed circumstances that have occurred since the Koch case. The evidence submitted by Kaneb is more than adequate for the Board to decide, without any discovery, whether to lift the rate prescription it imposed in Koch.²⁴ CFI has not disputed Kaneb's allegations regarding changed circumstances, including whether the Purchase Agreement transaction was conducted at arm's length. Indeed, as discussed below, CFI has not advanced any reason why it needs discovery.

The discovery questions propounded by CFI may be appropriate in the context of a rate challenge proceeding. However, the purpose of this proceeding is for the Board to determine whether to lift the rate prescription it imposed in the Koch decision. Kaneb is not requesting that the Board determine a new maximum prescribed rate. If and when the Board lifts the Koch rate prescription and Kaneb thereafter increases its rates, CFI will have a full opportunity to challenge the basis for Kaneb's new rates and seek discovery relating to Kaneb's rate increase. However, at this time, discovery is inappropriate and unnecessary.

²⁴ The lengthy proceedings required for prescribing a rate prescription are not required for vacating a prior rate prescription and returning ratemaking initiative to the carrier. See San Antonio, Texas v. Burlington Northern, Inc., 364 I.C.C. 887, 896 (1981). Therefore, while discovery may be appropriate in a Board proceeding to impose a rate prescription, it is not necessary in a Board proceeding to lift a prior rate prescription.

C. CFI's Discovery Requests are Solely for Tactical Purposes.

The Board's regulations provide that, for good cause shown, it may enter any order which justice requires may be entered to protect a party from annoyance, embarrassment, oppression, or undue burden or expense.²⁵ CFI has not explained why it needs discovery at this stage of the proceeding, after it has submitted its reply to Kaneb's evidentiary submission. In its motion to compel, CFI appears to be asserting that it has a "right" to conduct discovery and to "explore the facts underlying [Kaneb's] unsubstantiated allegations."²⁶ In fact, CFI does not have a right to discovery if the information sought is irrelevant or unduly burdensome.²⁷ As demonstrated above, the information sought by CFI does not relate to whether circumstances have materially changed on the pipeline such that the factual underpinnings of the Koch prescription are no longer valid. Kaneb has made that showing through verified statements and exhibits.

CFI clearly does not intend to use any of the information it seeks through discovery. Since CFI has filed its reply evidence and does not indicate that it will attempt to make any additional filings, there is no possibility that CFI could make any use of the information it is seeking, even assuming it were relevant. If CFI really needed the information, CFI could have approached the Board anytime after the Board issued its August 11 Decision, and requested that the schedule be changed to include an opportunity for discovery. However, CFI did not request a change in the procedural schedule to allow for discovery.

²⁵ 49 C.F.R. § 1114.21(c).

²⁶ CFI motion to compel at 1, 3.

²⁷ 49 C.F.R. § 1114.21(c). In addition to its general objection, Kaneb raised specific objections based on undue burden for several of CFI's discovery requests.

In addition, CFI could easily have filed its summary and conclusory motion to compel before this late date, if it truly intended to use the information it seeks through discovery. Thus, it is clear that CFI is seeking to compel discovery, with full knowledge that it will be virtually impossible for Kaneb to respond to the discovery and at the same time respond by October 14 to CFI's reply evidence, only for tactical purposes. CFI's aim in filing discovery requests and a motion to compel appears to be two-fold. The first objective is to unduly burden and distract Kaneb from preparing its rebuttal to CFI's reply evidence. The second objective is to be able to disparage Kaneb, as it has done in its response to Kaneb's evidence, by stating that Kaneb has "stonewalled" its discovery attempts.²⁸ The Board should not permit parties to engage in such practices. Thus, Kaneb requests that the Board issue a protective order in this proceeding.

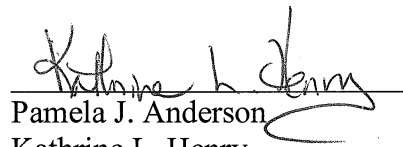
²⁸ CFI Response to Kaneb's Opening Evidence at 7.

IV. CONCLUSION

WHEREFORE, in consideration of the above and foregoing, Kaneb respectfully requests that the Board:

1. Deny CFI's motion to compel discovery;
2. Grant this Motion for Protective Order to order that discovery not be had in this proceeding at this time; and
3. Grant Kaneb such additional relief as the Board deems proper.

Respectfully submitted,



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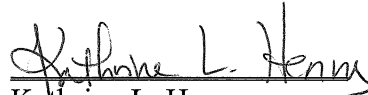
Attorneys for Kaneb Pipe Line Partners, L.P. and
Kaneb Pipe Line Operating Partnership, L.P.

Dated: October 8, 2004

CERTIFICATE OF SERVICE

Pursuant to Rule 1104.12 of the Surface Transportation Board's Rule on Service of Pleadings and Papers, I hereby certify that I have this day served a copy of the foregoing document by hand delivery upon all parties of record in this proceeding and upon Counsel for Dyno Nobel, Inc.

Dated at Washington, D.C., this 8th day of October 2004.


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